**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 9**

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and

Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

**RESPONDENT'S REPLY TO THE UNION'S ANSWERING BRIEF**

The Union's Answering Brief is fundamentally flawed because it relies entirely on assumptions at odds with the undisputed facts and legal precedent. As an initial matter, the Union refers to the Company's decision to sell its routes as "subcontracting." (Union's Brief at 6, 9.) But the Company's decision to sell routes to distributors to effect a change in its business model does ***not*** amount to subcontracting. Rather, as recognized by controlling law and the Paolucci Award, Mike-sell's transferred both the risk ***and*** potential reward to distributors, thereby removing it from the realm of subcontracting. (Tr. 151-52, 163-64, 259-60, 263-64, 273-74, 874-75; RX-2.)

The Union's continued reliance on *Fibreboard Paper v. NLRB*, 379 U.S. 203 (1965), is woefully misplaced. (GC's Brief at 7.) The U.S. Supreme Court expressly limited its holding in *Fibreboard* to the unique and specific facts of that case and did not intend it to apply to every conceivable instance of alleged "subcontracting." Chief Justice Warren wrote:

> We are thus ***not*** expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). ***Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.***

379 U.S. at 215 (emphasis added). Justice Douglas made this doubly clear in his concurrence, stating:

> The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that ***this*** employer's decision to subcontract ***this*** work, involving 'the

> replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment,' is subject to the duty to bargain collectively.

*Id.* at 203 (emphasis added).

The specific type of "subcontracting" to which *Fibreboard* applies is patently different from the Company's sale of routes to distributors. Not only did the *Fibreboard* contractors perform the same work that company employees had performed, but also they did so on company premises, with company-owned equipment, under the direct control of company supervisors. *Id.* at 213. Fibreboard remained responsible for whatever maintenance costs were incurred by the contractors, and the employer ***directly*** enjoyed the benefit of the contractor's work. *Id.* at 219.

The decision to subcontract the maintenance work in *Fibreboard* did not change the basic operation of the employer's business, which remained exactly the same. *Id.* at 213. Accordingly, to require bargaining about this subcontracting decision did ***not*** significantly abridge Fibreboard's freedom to manage its business. *Id.* Moreover, the advantages Fibreboard realized from subcontracting were derived almost entirely from the elimination of employee wages and fringe benefits, as well as adjustments in work schedules, enforcement of more stringent production quotas, and closer supervision of new personnel. *Id.* at 219. These topics are uniquely suited for collective bargaining because the union can offer meaningful concessions that result in the same advantages to the employer.

The facts of the instant case are entirely different from *Fibreboard* and its progeny. Here, distributors ***take title to the Company's product*** and ***retain complete discretion to raise and lower product prices***—with the exception of a few chain accounts having enough market clout to insist on maximum prices. (Tr. 570, 608, 990-91; JX-12, § 3; RX-16, § 3.) Distributors assume the risk of loss ***and*** the potential gains associated with owning and selling Company product. Mike-sell's retains no legal concern over what is done with its product, imposing no performance standards whatsoever beyond basic sanitation. (Tr. 559, 596-97, 593, 968, 983-84; RX-16.) All other business decisions—including when and how to distribute, to whom to distribute, what and how much product to order, where to store the product, what to charge for the product, whether to extend credit to customers, and how to advertise—are made by distributors. (Tr. 563, 597-99, 602, 625-26, 967-68, 970, 987.) Unlike in *Fibreboard*, the work performed by distributors is ***not*** performed from the Mike-sell's facility, nor is the Company directly concerned with whether any distributor sustains a profit or loss. The distributors own and operate their own trucks, and they may hire their own employees to distribute products for them. (Tr. 487, 488, 508, 509, 566, 606, 962, 965.)

The Union relies on *Torrington Industries*, 307 NLRB 809 (1992), to argue that the sale of routes is akin to "*Fibreboard* subcontracting." *Id.* at 811. Yet the Union concedes the decision to transfer work in *Torrington* did not lie at the core of entrepreneurial control. (Union Brief at 10 (citing 307 NLRB at 811).) The employer claimed the "seasonal nature" of its business justified the transfer of work from bargaining unit employees to non-unit contractors. *Id.* at 810. The Board noted that, while the seasonal nature of the business might require hiring outside contractors for peak periods, it did ***not*** entitle the employer to lay off union employees and replacing them with non-union contractors, which was a decision that "had nothing to do with a change in the 'scope and direction' of its business." *Id.* at 811. Moreover, no substantial commitment of capital was involved so as to bring the decision within "the core of entrepreneurial control." *Id.*

In both *Fibreboard* and *Torrington*, the ***control*** of the work always remained with the employer. But here, the Company's decision to ***sell*** its routes, products, and equipment to distributors relinquishes that control. That routes may revert to Mike-sell's if a distributor goes out of business does not undermine the fact that ***the transaction involves a transfer of title***. Mike-sell's is ***not*** simply replacing bargaining unit employees with those of independent contractors to avoid labor costs. Rather, distributors enjoy a level of independence and autonomy that make them materially different from in-house drivers. Distributors have far more at stake than simply earning a living, and unlike drivers, they have no weekly "salary guarantee" to save them if their sales falter. The success of their own enterprises—and of their own employees—depends on their independent ability to effectively manage the financing, inventory, storage, and distribution of the snack food products they purchase outright from Mike-sell's. (Tr. 163-64, 259-60; RX-2, p. 17.) These distinctions are not mere technicalities but are fundamental differences that change the nature of the Company's business model. Indeed, the Union's disingenuous attempt to equate the act of subcontracting with the act of transferring rights and titles to property only serves to highlight the significance of this distinction. (Union's Brief at 9.)

Managing one's own distribution business can be highly lucrative, as explained by driver-turned-distributor Lisa Krupp. (Tr. 988-89.) But going into business for oneself is also a risky venture, as distributors cannot rely on Mike-sell's to cover the losses they may suffer due to low sales, stale or expired product, uncollectible accounts, or damaged or stolen inventory. (Tr. 556-57, 596, 669, 970-71.) The gravity of risk distributors face is perhaps best evidenced by the many former distributors—like Keystone, Gaudio, Helm, and Buckeye—who have gone out of business and/or filed bankruptcy. It is this same risk of loss that motivated Mike-sell's to change its business model by minimizing its distribution, liquidating its capital, and reallocating its scarce resources toward core manufacturing and branding initiatives—two activities at the heart of its business. (Tr. 173, 244-45, 318, 340, 374, 549-53, 557, 898; RX-27; RX-28.)

The Union attempts to downplay the autonomy with which distributors run their businesses, citing the testimony of former employee Lisa Krupp that "several aspects of her work as a[n employee route sales driver] . . . did not change" when she became an distributor. (Union's Brief at 8.) The Union thus argues that "the difference between before and after the sale of the four routes at issue is essentially who is delivering Respondent's product." (Union's Brief at 13.) But whether distributors and drivers perform similar work is not immaterial; what matters is that distributors perform work primarily for their own benefit, whereas drivers perform work for the benefit of Mike-sell's.

The fact that Mike-sell's may finance the sale of routes or trucks as part of an arms-length transaction does not change the underlying analysis. *Fibreboard Paper* and *Torrington* confirm that the relevant question is not ***how*** Mike-sell's transfers its interest to a distributor—just whether the Company continues to directly control, and enjoy the benefits of, that work. In *Fibreboard*, the contractors ***still worked for Fibreboard***, the direct beneficiary of their labor. Here, distribution rights are sold to independent businesses; those businesses—***not Mike-sell's***—control distribution and are directly impacted by their success or failure in reselling product bought outright from the Company. If Lisa Krupp chose—for example—to sit at home all week and eat Mike-sell's chips rather than distributing her inventory to customers, ***the Company would still get paid.*** It would be Krupp—not Mike-sell's—who would be out the money for the product. This is because distributors are not delivering the Company's product; they are delivering ***their own*** product, assuming both the risk of loss and the potential reward. Such a basic yet fundamental distinction contradicts the Union's assertion that Mike-sell's was "not in fact truly 'getting out' of the distribution business." (Union's Brief at 12.)

Even if selling routes to distributors could be considered "subcontracting," that alone would not require Mike-sell's to bargain over the sale of routes. The U.S. Supreme Court confirmed in *Fibreboard* that some types of subcontracting involve such important and complex business decisions that mandatory bargaining would be inappropriate. *Fibreboard*, 379 U.S. at 215. The *Torrington* Board likewise recognized that "there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining." *Id.* at 810.

The Union seems to view a profitability determination as one such complex business decision that need not be bargained, justifying its failure to challenge the sale of routes in 2012 and 2013 based on their "unprofitab[ility]." (Tr. 302-04, 307-08.) The Union claims to have objected to the sale of Routes 104 and 122 because "they do not have the same characteristics as the route involved in the Paolucci decision," i.e., they were not "unprofitable." (Union's Brief at 5; *see also* ALJ, pp. 11-12; Tr. 156-157, 89; JX-8.) The Union's request for "documents demonstrating profitability" further evidences its belief that sales based on "profitability" are not suitable for bargaining. (JX-8, p. 2.) Attempting to distinguish *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), and *W. Virginia Baking Co.*, 299 NLRB 306 (1990), the Union argues that in those cases, "the employer completely eliminated all driver-salesman routes and sold all associated vehicles," whereas Mike-sell's "has not taken such a step for financial reasons." (Union's Brief at 14.) However, it makes no sense to accept the sale of a ***single*** unprofitable route as lawful (as occurred throughout 2012 and 2013), and to accept the elimination of ***every*** unprofitable route as lawful (as in *Adams Dairy* and *W. Virginia Baking*), but to reject the sale of ***several*** routes (in an attempt to minimize an overall unprofitable division) as unlawful. As in 2012 and 2013, the Company's decision to sell the four routes at issue are part of a larger business strategy based on overall profitability. Mike-sell's would not seek to minimize its distribution business if it were a profitable endeavor for the Company.

The Company's economic analysis focused on shifting the risk of loss, liquidating assets, and reallocating capital toward manufacturing. (Tr. 244-45, 320, 331, 340, 557, 898.) The elimination of Routes 102, 104, 122, and 131 collectively resulted in the one-time liquidation of assets valued at $126,000, as well as annual savings of nearly $195,000 for ***non-labor*** expenses. (ALJ, p. 13; Tr. 538-541-42.) The route eliminations also resulted in about $229,000 in annual labor cost savings, but those savings would be offset by the higher cost of distributor margins totaling $324,000 for the same time period. (ALJ, p. 13; Tr. 540.) When labor ***and*** non-labor savings were compared to the cost of distributor margins, Mike-sell's saved over $89,000 annually—while putting much less at risk—and the Company could also afford a major capital investment in new manufacturing equipment due to recouped capital and increased lines of credit. (Tr. 284, 540, 542-43, 548-55, RX-27; RX-28.) These benefits—particularly those derived from shifting the risk of loss—could not have been achieved at the bargaining table.

That Mike-sell's is concerned with the overall profitability of the distribution division—as opposed to the profitability of individual routes—does not alter the analysis with respect to whether the decision is appropriate for collective bargaining. In either scenario, Mike-sell's is changing the scope and direction of its business due to concerns that cannot be alleviated by Union concessions. As Arbitrator Paolucci recognized, the sale of a single route reflects "a whole new method of doing business" because it necessarily involves consideration of several factors beyond labor costs, such as return on investment and net impact on enterprise profitability. (RX-2 pp. 17-19.) If the sale of a single route involves "a whole new method of doing business," certainly, the sale of multiple routes—resulting in elimination of 25% of the distribution division—is even more consequential. (RX-2 pp. 18-19.)

The Union attempts to misrepresent the various factors that contributed to the Company's decision to sell routes, claiming "Mr. Kazer could not identify a single, concrete example of the risk of loss that Respondent maintains is shifted away from Respondent" to distributors. (Union's Brief at 13.) This is far from accurate. Mr. Kazer testified that the Company's economic analysis focused on shifting the risk of loss inherent in distribution, including losses due to fraudulent transactions and uncollectible customers, as well as lost, stolen, and damaged property. (Tr. 543, 834-35.)

Moreover, the Union's claim that Mike-sell's "assessed the financial favorability of particular routes around the time it was soliciting" distributors is inaccurate and misleading. (Union's Brief, at 7.) Phil Kazer testified that by 2016, the ***entire*** route sales division of the Company had become unprofitable, and thus the business decision was made to sell ***any*** route. (Tr. 234-35, 238.) The Company merely looked at the average of drivers' weekly sales to determine whether it would make financial sense for them to go from being an in-house driver to being an independent distributor, given the need to purchase the product outright, run their own business, and pay their own expenses. (Tr. 713-16.) The fact that Lisa Krupp chose to purchase two specific routes (as opposed to other routes) merely demonstrates that distributors are in complete control of their own destiny.

Given the Company's focus on overall enterprise profitability, *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981), is on point. There, as here, the employer was focused on profitability as a whole, and the decision to cancel an individual service contract (just as the decision to sell individual routes as discrete business units) involved a change in the scope and direction of the enterprise, akin to the decision of whether to be in business at all. *Id.* at 677. The U.S. Supreme Court recognized that the employer's need to operate freely in deciding whether to shut down part of its business for economic reasons outweighed any incremental benefit that might be gained through the union's participation in making the decision. *Id.*

The Union tries to distinguish *First Nat'l Maint.* by arguing that "the employer, unlike [Mike-sell's], did not enter into contracts with other firms to continue serving the nursing home." (Union's Brief at 14.) Again, the Union misrepresents the very nature of the Company's relationship with distributors. Mike-sell's is not "hiring" distributors to perform the Company's distribution work. Rather, Mike-sell's instead decided to eliminate as many routes as possible by selling the sales territory—and its product—to distributors who are themselves in the business of distribution.

As in *First Nat'l Maint.*, the Company's decision to sell individual routes came from a desire to eliminate (as much as possible) the effects of an outdated, unprofitable distribution model and refocus efforts on manufacturing and branding. If labor costs were the concern, Mike-sell's could just seek Union concessions. But bargaining over the sale of routes would be futile, given the relatively small role labor costs played in the Company's economic and strategic analysis. (Tr. 306, 318, 320, 331, 340, 355, 364.) Forcing the parties to bargain when the Union could not possibly offer Mike-sell's what it ultimately needs—a shift in the risk of loss—would only lead to Mike-sell's incurring more loss, and wasting valuable time and resources.

For these reasons, *Dubuque Packing Co.*, 303 NLRB 386 (1991), is also inapposite. There, the decision to ***relocate*** work from a union to non-union facility was based ***entirely*** on labor costs, as seen from the company's repeated attempt to seek union concessions. *Id.* at 393. The employer admitted that labor concessions ***could*** have changed the decision to relocate in *Dubuque*, so the matter was well-suited for collective bargaining. *Id.* Here, there was no "relocation" of work. Mike-sell's instead sold its routes to independent businesses, divesting itself of both risk and reward. That cost-prohibitive pension withdrawal liability prevents Mike-sell's from selling ***all*** routes does not change the nature of its decision to sell individual routes, which—as evidenced by drivers' strong preferences—function as discrete and severable business units. Mike-sell's was not motivated by labor costs, or any other factor subject to Union influence. Thus, unlike in *Dubuque*, the Union could not have changed the Company's decision.

As the Board made clear in *Dubuque*, the 8(a)(5) analysis ultimately turns on the central purpose of the Act: to promote labor peace through collective bargaining ***over those matters suitable for negotiation***. 303 NLRB at 392. The Act was not intended to serve either party's individual interest, but to foster a neutral system where conflicting interests could be resolved. *First Nat'l Maint.*, 452 U.S. at 680-81. A union's ultimate interest—in any employer decision—is job security. *Id.* at 681. But here, allowing the Union to participate in the decision-making process over the sale of routes would <u>not</u> improve job security, as no jobs were lost as a result of the Company's decision to sell routes. (Tr. 113, 182, 248-49, 377, 408.) Hence, the Union's participation could only serve to forestall the inevitable.

The proper protection for the Union's interest in this case would have come in the form of effects bargaining. Effects bargaining would preserve the Company's freedom to choose its own business model while also giving employees a chance to bargain over any loss they suffered due to the sale of routes—such as being forced to bump into a route with lower weekly sales. But the Union never accepted the Company's offer to bargain over any alleged effects.

The Union refers to the Company's citation to Section 8(a)(3) of the Act as a "red herring." (Union's Brief at 18.) But it is Section 8(a)(3) that protects the Union's interest in fair dealing by prohibiting management decisions—that could otherwise be made without Union input—if they are motivated by antiunion animus. *See* Respondent's Exceptions Brief at 16-17. There is no evidence that anti-union animus motivated the Company's decision to sell its routes, and absent such evidence, Mike-sells retains the ***inherent*** right to transfer and assign work, change operational procedures, invest or withdraw capital, and sell or merge business units. *See, e.g., NLRB v. Transmarine Nav. Corp.*, 380 F.2d 933, 938-39 (9th Cir. 1967). *See* Respondent's Exceptions Brief at n.3.

Ultimately, as was the case in *First Nat'l Maint.*, *Adams Dairy*, and *W. Virginia Baking Co.*, the Company's decision to sell off individual routes constitutes a change in the scope and direction of its business motivated by factors beyond mere labor costs. The Board has acknowledged that the liquidation of the driver-salesman method of distribution constitutes a fundamental change in the nature and direction of the employer's operation. *See W. Virginia Baking*, 299 NLRB 306. That Mike-sell's is unable to fully liquidate its entire route-sales division immediately—and instead liquidated only 25% of it in 2016—does not change the fact that the sale of four routes effects a fundamental change in the scope and direction of the Company's business as to those discrete business units. There is no basis to hold that a business change of this nature cannot happen gradually, over time.

Even if the Union had some right to bargain over the sale of routes, the Union waived that right when it failed to file a grievance over the sale of Route 102. The Union claims its grievance filed in May 2016 "would have covered that." (Union's Brief at 4.) This argument makes no sense. If the May 2016 grievance covered the sale of Route 102, it should have equally covered the sale of Routes 104, 122, and 131—yet the Union filed separate grievances over those sales. (JX-7; JX-11.) Finally, the Union has repeatedly claimed that it did not protest the sale of Routes in 2012 and 2013 because they were unprofitable. (Union's Brief at 5.) But the Union did not know which routes would be sold—or whether they were profitable—at the time the May 2016 grievance was filed. Hence, there is no reason to assume that the Union's May 2016 grievance covered Route 102, since no specifics were known for two months.

Ultimately, the Company's decision to sell the routes at issue to distributors derived from its inherent management right to make decisions concerning the scope and direction of tis business. The Union concedes that decisions regarding the profitability of certain business ventures constitute the very type of "entrepreneurial decisions" permitted by *Torrington*. (Union Brief at 10 (citing 307 NLRB at 811).) It necessarily follows that Mike-sell's was not required to bargain over the sale of routes that effectuated its entrepreneurial decision to minimize its distribution business by selling off individual routes as discrete business units. For these reasons, the NLRB should grant Respondent's Exceptions and issue an order overruling the ALJ's Decision.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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